CANADIAN HUMAN RIGHTS TRIBUNAL

ANNUAL REPORT | 2012

Providing effective resolution of discrimination complaints for Canadians

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Chairperson's Message

Small departments and agencies expect every year to bring new challenges, and 2012 was no exception as the Canadian Human Rights Tribunal grappled with a heavy caseload, the unexpected departure of the Chairperson, increased reporting requirements and ongoing challenges on the information technology (IT) front.

Nevertheless, innovations implemented over the past three years were evaluated and refined to capitalize on enhancements to the Tribunal's complaint resolution process, with a focus on mediation, to accommodate the growing number of unrepresented complainants.

From the perspective of an Acting Chairperson, 2012 was noteworthy for the way that employees throughout the organization worked together to keep operations moving efficiently and effectively for the benefit of all Canadians. It is to the enduring credit of Tribunal staff that in 2012 productivity remained stable despite the many challenges.

As in 2011, the Tribunal again had a preview of what to expect from the repeal of section 67 of the *Canadian Human Rights Act*. The changes that took effect in June 2011 give Aboriginal people governed by the *Indian Act* the same access to the *Canadian Human Rights Act* that others in Canada have had for nearly 35 years.

The heightened complexity inherent in this new class of complaints is being foreshadowed in *FNCFCS et al. v. Attorney General of Canada*, which, although not a section 67 repeal case, gestures to the complex and novel issues that may be raised by this broadening of the Tribunal's mandate. In their 2007 complaint, the First Nations Child and Family Caring Society (FNCFCS) and the Assembly of First Nations had alleged that First Nations children living on reserves were being discriminated against by Indian and Northern Affairs Canada because funding for child and family care services for on-reserve children was less than that spent by provinces for children living off reserves. The scope and breadth of this complaint was unprecedented and the issues are about to be examined again by the Tribunal at the behest of the Federal Court, which overturned the Tribunal's dismissal of the case and ordered the Tribunal to hear the complaint again.

The raft of novel, complex and precedent-setting section 67 cases will require more resources than are typically allotted to resolving complaints—more resources for case management, mediation, hearings and decision making. To this end, the Tribunal has appointed a three-person panel of Members in the *FNCFCS et al. v. Attorney General of Canada* case to adjudicate the matter. Three-Member panels have not been utilized for a number of years, and are expected to seriously strain Tribunal resources, especially if two such panels must run concurrently.

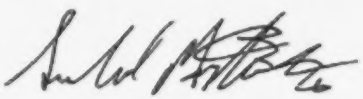
The Tribunal continued to enjoy success with its mediation program, resolving 63 percent of cases closed in 2012 by mediation. Many refinements have been introduced to the complaint resolution process in recent years, including a greater emphasis on case management conference calls presided over by Tribunal Members. The increased focus on teleconferencing rather than solely written communication has done much to demystify and expedite the inquiry process. Parties are also reaching settlements more speedily thanks to the Tribunal's increasing reliance on a flexible approach to mediation—in which the mediating Tribunal Member facilitates the exploration of mutually beneficial outcomes—as well as the recently added requirement that parties detail from the outset the remedies sought, including the amount of any monetary compensation sought or proposed.

The need to expedite and demystify complaint resolution was made more urgent in October 2011, when the Supreme Court of Canada upheld a Federal Appeal Court decision that the Tribunal had no jurisdiction to award legal costs. This has put additional pressure on the Tribunal to strive for ever-more accessible and simplified procedures so as to minimize the disadvantages accruing to a party who is unable to afford legal representation. Several of these innovations were the subject of cross-country stakeholder consultations in 2011, a report on which will be forthcoming in 2013.

Part of the challenge of managing resources to cope with the demands of increasingly complex cases will be to reduce the costs associated with IT services and seek improved services. The Tribunal will therefore make it a priority to find a viable alternative to its current provider, which, despite its commendable efforts in 2012, is not ideally structured to cost-effectively service the full spectrum of IT needs of a small agency.

On behalf of the Tribunal, I made two appearances before House of Commons committees at their request in 2012, providing background to the Standing Committee on the Status of Women regarding sexual-harassment complaints and to the Standing Committee on Justice and Human Rights in aid of its deliberations on a private member's bill seeking to add gender identity and gender expression as prohibited grounds of discrimination in the *Canadian Human Rights Act*.

The environment of uncertainty inherent in the departure of the Chairperson contributed to the many challenges faced by the Tribunal this year—a year with limited resources. I wish to acknowledge and thank all employees for their continued and ongoing commitment, dedication and professionalism as we delivered our mandate. As Acting Chairperson, I will continue to build on the successes of 2012, capitalizing on the strengths of our resilient workforce and availing myself of the wealth of expertise and resourcefulness that so enrich this Tribunal.



Susheel Gupta,
Acting Chairperson

What We Do

The Canadian Human Rights Tribunal is a quasi-judicial body that inquires into complaints of discrimination referred to it by the Canadian Human Rights Commission and decides whether the action cited in the complaint is a discriminatory practice within the meaning of the *Canadian Human Rights Act*. The Tribunal can also review directions and assessments made under the *Employment Equity Act*.

The Tribunal operates pursuant to the *Canadian Human Rights Act*, which aims to give effect to the principle that all individuals should have an equal opportunity to live their lives unhindered by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex (including pregnancy), marital status, family status, sexual orientation, disability (including drug dependency) or pardoned criminal conviction. The discriminatory practices outlined in the Act are designed to protect individuals from discrimination, in particular, in the provision of goods and services, employment and communications. The Act applies to federally regulated employers and service providers, including: federal government departments and agencies, federal Crown corporations, chartered banks, airlines, shipping and inter-provincial trucking companies, and telecommunications and broadcasting organizations. With the repeal of section 67 of the Act, the Tribunal now also considers complaints against the federal government, First Nations governments and federally regulated Aboriginal organizations regarding acts or decisions made under the *Indian Act*.

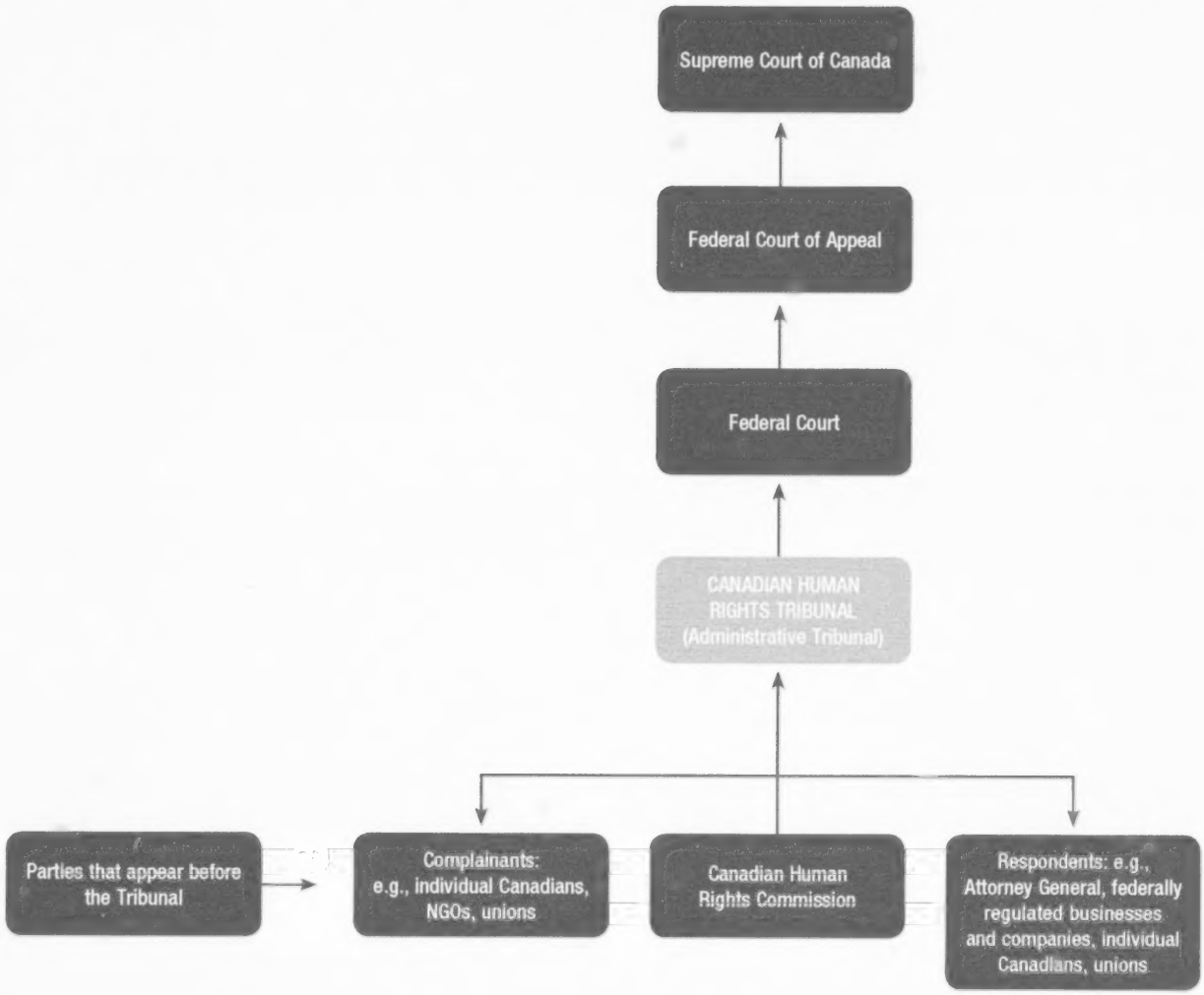
Tribunal Reports on Plans and Priorities
http://chrt-tcdp.gc.ca/NS/reports-rapports/plans-eng.asp

Like a court, the Tribunal is strictly impartial and renders decisions that are subject to review by the Federal Court at the request of any of the parties. However, unlike a court, the Tribunal provides an informal setting where parties can present their case without adhering to strict rules of evidence and procedure. If the parties are willing, the Tribunal also offers mediation services to allow parties the opportunity to settle their dispute with the assistance of a Tribunal Member.

Administrative responsibility for the Tribunal rests with the Registry, which plans and arranges hearings and acts as a liaison between the parties and Tribunal Members. The Registry answers to the Tribunal's Executive Director, who is responsible for managing the operating resources allocated to the Tribunal by Parliament. Details of the Tribunal's activities, including recent developments in comptrollership, management accountability and public administration, can be found in the Tribunal's performance reports.

Tribunal Performance Reports
http://chrt-tcdp.gc.ca/NS/reports-rapports/perf-rend-eng.asp

Human Rights Complaint Resolution Framework
(Where the Tribunal fits in)


Supreme Court of Canada
Federal Court of Appeal
Federal Court
CANADIAN HUMAN RIGHTS TRIBUNAL (Administrative Tribunal)
Parties that appear before the Tribunal
Complainants: e.g., individual Canadians, NGOs, unions
Canadian Human Rights Commission
Respondents: e.g., Attorney General, federally regulated businesses and companies, individual Canadians, unions

Resolving Complaints Fairly and Effectively through Mediation

A cornerstone of the Tribunal's complaint resolution process is its voluntary mediation program, which enables the parties to be heard without a costly adjudication hearing, and which provides them with the expertise and support to reach closure in a confidential and respectful environment.

Mediation is offered throughout the inquiry, but in most cases, parties who engage in mediation at the Tribunal are responding to an offer for "pre-disclosure" or "early" mediation. Regardless of when during the inquiry it occurs, however, a key aspect of the mediation process is that the Tribunal Member-mediator is not the same person who adjudicates the case, should it proceed to hearing, unless all parties are represented by lawyers, and provide clear written consent to have the Member-mediator also serve as Member-adjudicator.

During mediation, the Tribunal Member-mediator helps the parties envisage a broad range of solutions to address their underlying interests. Rather than seeking a compromise between disparate positions, the Member seeks to integrate the interests of *both* parties to a typical complaint—employer and employee or service provider and client—with an eye to healing the rift between the parties and promoting constructive relationships. Where the Member deems it appropriate—having regard to whether the parties would be receptive to this kind of feedback—the Member may share his or her impressions about the relative strengths and weaknesses of the parties' positions.

If a first round of mediation fails to resolve the complaint, the parties may be offered mediation again after they file their particulars and disclose their relevant documents. This post-disclosure mediation, again presided over by a Tribunal Member, helps the parties identify their underlying interests and articulate a range of solutions. However, because the parties are ready to commence a full hearing at this time they are generally more informed about the relative strengths and weaknesses of their positions. There is no firm deadline for seeking post-disclosure mediation; parties may in certain circumstances even be able to explore mediation during the hearing itself.

An important advantage of mediation is that it reduces the power imbalance that may exist between parties. Since even successful parties cannot recover their legal costs at adjudication, complainants and respondents have a strong incentive to keep such costs to a minimum; but many complainants—as well as some respondents—who would not be able to afford legal representation for an entire hearing are able to retain a lawyer for a one-day mediation.

If the mediation does not result in settlement, the Member may, with the consent of the parties, help the parties narrow down the issues to be litigated in the hearing, by identifying those issues that are not—or that are no longer—points of contention.

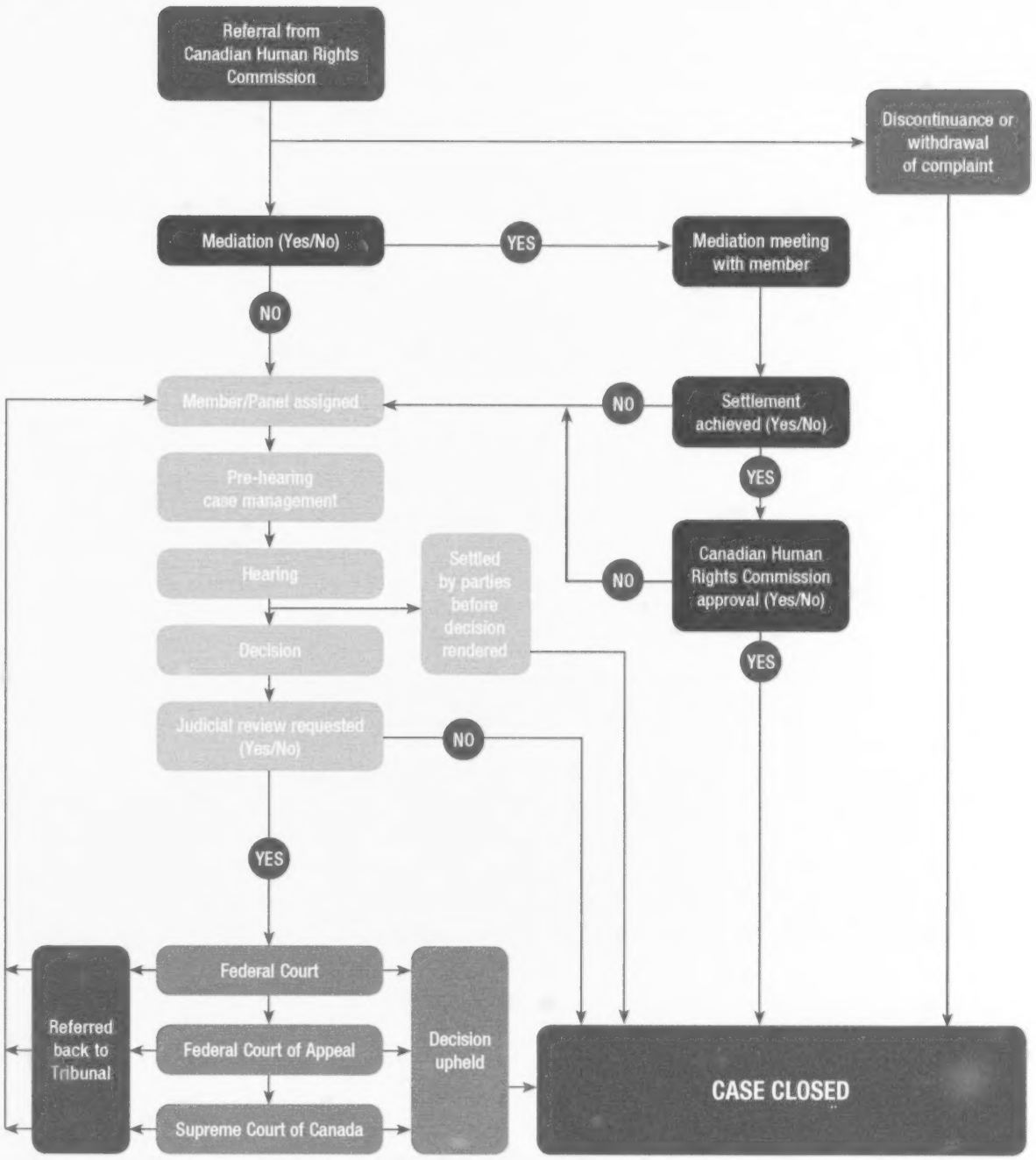
The appropriateness of mediation for addressing human rights complaints has long been debated. One concern has been the power imbalance that is often observed between many complainants and respondents. The Tribunal has taken numerous measures to address this issue in recent years. For example, the physical layout of the mediation facilities makes it possible for parties to negotiate without ever having to be in the same room together. The presence of a representative from the Canadian Human Rights Commission at all Tribunal mediations also levels the playing field where unrepresented parties

are facing a well-resourced adversary, since the Commission representative, usually a dispute resolution practitioner, can provide extra support to a party who needs it. Participants are free to bring a support person of their own with them to the mediation and parties who sign settlement agreements without legal representation can avail themselves of a seven-day cooling off period. This condition enables them to obtain legal advice about the settlement and withdraw from it within seven days following signature if they no longer feel it reflects their best interests.

Another major concern with mediation has been whether so-called private settlements between parties are truly in the public interest, given that the complainant may settle for a remedy that fails to address a broader underlying systemic problem. However, it is important to note that even mediated settlements are not entirely private; where they occur before the start of a Tribunal hearing, they must be referred to the Canadian Human Rights Commission for approval or rejection. Settlements approved in this way may be made an order of the Federal Court for enforcement purposes. Moreover, some mediated settlements may include clauses committing respondents to create or revise institutional policies on discrimination or to incorporate measurable targets and performance criteria designed to protect a wider constituency of employees or clients.

Thus mediation is a vital focus of the Tribunal's complaint resolution process, delivering speedy but principled solutions to affected parties and liberating Tribunal resources for reallocation to cases where adjudication is truly necessary.

How the Tribunal Works



Caseload

The Canadian Human Rights Commission referred 128 new complaints to the Tribunal in 2012.

As the Tribunal carried forward 245 active complaints from earlier years, its caseload for the year was a record 373 cases, of which 335 remained active at the end of the year.

The Tribunal is a demand-driven organization with a mandate dependent on referrals from the Canadian Human Rights Commission. The repeal of section 67 of the *Canadian Human Rights Act* was expected to dramatically increase the number of cases referred by the Commission and to introduce two new categories of human rights complaint:

(i) complaints alleging that a provision of the *Indian Act* is discriminatory; and

(ii) complaints alleging that a decision made under or pursuant to the *Indian Act* is discriminatory.

While 2012 did not bring the anticipated increase in cases, early indications are that 15 to 20 new cases directly related to the repeal of section 67 of the *Canadian Human Rights Act* can indeed be expected in 2013, even though the precise number of cases referred in any given year is impossible to predict. The section 67 repeal cases are expected to be especially complex since they will be exploring new areas of human rights law, and their scope and breadth will undoubtedly exceed that of most complaints filed with the Tribunal to date. A significant increase in the number of complex matters will severely affect the Tribunal's ability to meet its mandate with the current resource levels.

The Tribunal is already carrying a sizable backlog of cases.

As the graph shows, the number of cases referred to the Tribunal annually by the Commission averaged 91 in the 2000s. In 2010 the Commission referred a record 191 cases. The spike in case referrals, coupled with the increasing complexity of many Tribunal cases in recent years, has fueled a growing backlog.

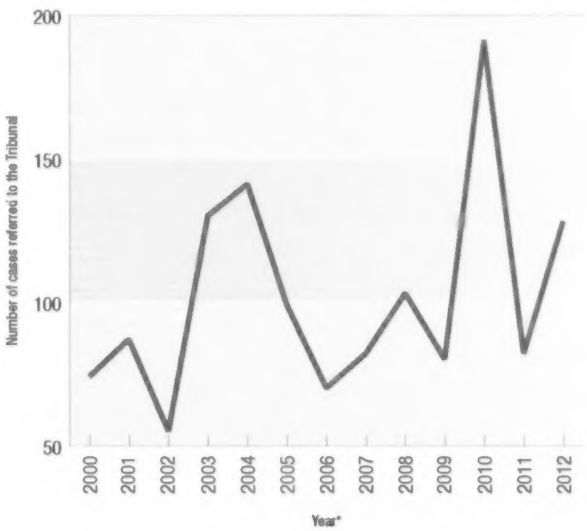
Meanwhile, many of the cases referred to the Tribunal continue to benefit from an increasingly refined Tribunal mediation program. Of the 38 complaints resolved in 2012, 24 (63%) were settled through mediation, a figure similar to last year's 67%. A further 6 cases were resolved through decisions, and the remaining 8 were either withdrawn or settled between the parties without Tribunal involvement.

In 2012, Tribunal Members conducted 43 mediation sessions, presided over hearings into 13 complaints, and issued 6 decisions and 25 rulings.

Of the 128 complaints referred by the Commission this year, 36 involved complaints against federal government departments and agencies; 84 involved complaints against small businesses, banks or other corporations; 4 complaints were against First Nations governments; and 4 complaints were filed against individuals.

The prohibited grounds of discrimination cited in the 43 mediated cases (keeping in mind that often a single complaint could invoke multiple grounds) were as follows: disability (24), sex (8), race (8), national or ethnic origin (6), age (6), religion (6), colour (4), family status (2) and marital status (1).

Cases referred to the Canadian Human Rights Tribunal by the Canadian Human Rights Commission, 2000–2012



* These figures are for calendar years.

Tribunal Rules and Procedures

The Tribunal has developed the following rules, procedures and guides to assist parties in their dealings with the Tribunal:

- Canadian Human Rights Tribunal Practice Note No. 1—Timeliness of Hearings and Decisions
- Canadian Human Rights Tribunal Practice Note No. 2—Representation of Parties by Non-Lawyers
- Canadian Human Rights Tribunal Practice Note No. 3—Case Management
- Canadian Human Rights Tribunal Rules of Procedure
- Guide to the Operations of the Employment Equity Review Tribunal
- Book of Jurisprudence
- Evaluative Mediation Procedures
- Tribunal Glossary (2010)

Further details concerning the Tribunal's rules, procedures and guides can be found at:
http://chrt-tcdp.gc.ca/NS/about-apropos/trp-rpt-eng.asp

Jurisprudence

The bulk of the Tribunal's work involves conducting mediations and hearings, issuing rulings, and rendering decisions. In 2012, the Tribunal heard cases on a broad range of issues. The full text of all decisions and rulings is available on the Tribunal's website.

Decisions and Rulings

Decisions

For the purpose of this report, a "decision" is defined as a set of adjudicative reasons issued by a Member or Panel of the Tribunal that actually decides the question of whether a discriminatory practice occurred in a given case.

Therefore, this would exclude reasons where:

- the only issue in contention before the Tribunal is what type of remedial order is appropriate;
- the complaint is dismissed for want of prosecution by the complainant;
- the complaint is dismissed for lack of jurisdiction, abuse of process, delay, irreparable breach of fairness, etc.; or
- the issue before the Tribunal is a motion for some type of procedural or evidentiary order.

Reasons issued in respect of these preceding matters are classified as rulings, which are dealt with in the Rulings section.

The following table outlines the decisions rendered by the Tribunal in 2012.

DECISIONS RENDERED BY THE TRIBUNAL IN 2012

#	Date	Parties	Citation
1	April 26	*Grant v. Manitoba Telecom Services Inc.*	2012 CHRT 10
2	June 8	*Nastiuk v. Couchiching First Nation and Sinclair*	2012 CHRT 12
3	October 11	*Hughes v. Human Resources and Social Development Canada*	2012 CHRT 22
4	October 25	*Lally v. Telus Communications Inc.*	2012 CHRT 27
5	November 23	*Cassidy v. Canada Post Corporation and Thambirajah*	2012 CHRT 29
6	November 30	*Closs v. Fulton Forwarders Incorporated and Fulton*	2012 CHRT 30

Rulings

As noted, all sets of adjudicative reasons issued by the Tribunal that do not qualify as decisions (i.e., they do not actually decide whether a discriminatory practice occurred) are classified as rulings. This would include reasons for an order that actually dismissed a complaint or otherwise brought the adjudicative mandate of the Tribunal to an end vis-à-vis the case in question.

The following table outlines the rulings issued by the Tribunal in 2012.

RULINGS ISSUED BY THE TRIBUNAL IN 2012			
#	Date	Parties	Neutral Citation
1	January 16	*Davidson v. Health Canada*	2012 CHRT 1
2	February 24	*Beattie and Louie v. Indian and Northern Affairs Canada*	2012 CHRT 2
3	February 24	*Emmett v. Canada Revenue Agency*	2012 CHRT 3
4	February 29	*Labelle v. Rogers Communications Inc.*	2012 CHRT 4
5	March 1	*Cruden v. Canadian International Development Agency and Health Canada*	2012 CHRT 5
6	March 29	*Bailie et al. v. Air Canada*	2012 CHRT 6
7	March 27	*Leung v. Canada Revenue Agency*	2012 CHRT 7
8	April 11	*Malec et al. v. Conseil des Montagnais de Natashquan*	2012 CHRT 8
9	April 18	*Thwaites et al. v. Air Canada and Air Canada Pilots Association*	2012 CHRT 9
10	May 24	*Palm v. International Longshore and Warehouse Union, Local 500, Wilkinson and Willicome*	2012 CHRT 11
11	June 12	*Blain v. Royal Canadian Mounted Police*	2012 CHRT 13
12	June 15	*Lindor v. Public Works and Government Services Canada*	2012 CHRT 14
13	July 6	*Cruden v. Canadian International Development Agency and Health Canada*	2012 CHRT 15
14	July 10	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Aboriginal Affairs and Northern Development)*	2012 CHRT 16
15	August 23	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Aboriginal Affairs and Northern Development)*	2012 CHRT 17
16	August 24	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Aboriginal Affairs and Northern Development)*	2012 CHRT 18
17	September 6	*Matson, Matson and Schneider (née Matson) v. Indian and Northern Affairs Canada*	2012 CHRT 19
18	September 20	*Grant v. Manitoba Telecom Services Inc.*	2012 CHRT 20
19	September 28	*Marsden v. Public Works and Government Services Canada and Courts Administration Service*	2012 CHRT 21
20	October 12	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Aboriginal Affairs and Northern Development)*	2012 CHRT 23
21	October 16	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Aboriginal Affairs and Northern Development)*	2012 CHRT 24
22	October 19	*Murray v. Immigration and Refugee Board*	2012 CHRT 25
23	October 25	*Hughes v. Transport Canada*	2012 CHRT 26
24	October 31	*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Aboriginal Affairs and Northern Development)*	2012 CHRT 28
25	December 12	*Egan v. Canada Revenue Agency*	2012 CHRT 31

Significant Tribunal Decisions and Rulings

The following Tribunal ruling and decisions are summarized to demonstrate their significance for Canadians.

RAY DAVIDSON V. HEALTH CANADA, 2012 CHRT 1

The complainant alleged that the respondent discriminated against him on the basis of his race, sex and colour in refusing to hire him. Among other allegations, the complainant claimed that during a competition for a job with the respondent, he was marked unreasonably hard compared with other candidates, accounting for his rank as fifth out of five eligible candidates. According to the respondent, the complainant had twice appealed to the Public Service Commission Appeal Board (PSCAB), which had considered the question of whether the complainant had been marked unreasonably hard. The respondent therefore brought a motion to preclude the presentation of evidence on this aspect of the complaint as it had already been litigated.

Relying on the recent decision of the Supreme Court of Canada in *British Columbia (Workers' Compensation Board) v. Figliola*, the Tribunal sought to determine whether the substance of the complaint had already been appropriately dealt with. In applying *Figliola*, the Tribunal found that there was no express statutory language removing the concurrent jurisdiction of the PSCAB to decide human rights issues. Although the complainant did not allege that he was the victim of discrimination before the PSCAB, the Tribunal found that if it were to examine the complainant's allegations regarding the assessment of candidates during the selection process, it would have to perform essentially the same analysis the PSCAB had done: comparing the exams of all the successful candidates with that of the complainant to determine if the assessment had been performed in a fair and equitable manner.

The Tribunal concluded that the complainant had had an opportunity before the PSCAB to present his case regarding the assessment of candidates during the selection process and that it did not make sense to expend public and private resources to re-litigate the same allegation. As a result, the Tribunal allowed the respondent's motion and ruled that it would not receive evidence on the issue of whether the complainant had been marked harder than other candidates during the selection process.

Results for Canadians

This ruling marked the Tribunal's first opportunity to consider the Supreme Court of Canada's decision in *Figliola* regarding the doctrines of *issue estoppel*, abuse of process and collateral attack, and their application in the context of human rights adjudication. Applying *Figliola*, and in determining that the substance of one of the complainant's allegations had already been appropriately dealt with, the Tribunal avoided the expenditure of public and private resources on re-litigating the issue. This ruling will serve as a valuable reminder to parties that, absent express statutory language to the contrary, all administrative tribunals have concurrent jurisdiction to apply human rights legislation and that the Tribunal will not review the decisions of other tribunals in this regard, or provide parties with another forum to essentially re-litigate issues that have already been decided by another body.

HEATHER LYNN GRANT V. MANITOBA TELECOM SERVICES INC., 2012 CHRT 10

The complainant alleged that her employer engaged in a discriminatory practice when it decided to terminate her employment, choosing to retain a more junior employee, based on the complainant's negative performance appraisals. According to the complainant, the symptoms of her disability, type II diabetes, negatively affected her performance at work. Although aware of her disability, she claimed her employer negatively assessed her performance without considering the effects of her disability. As her performance appraisals were used to compare her performance with that of another employee for the purpose of determining who would be terminated, the complainant alleged that her disability was a factor in her employer's decision to refuse to continue to employ her.

The respondent argued that the symptoms associated with the complainant's disability did not affect her work performance or her performance appraisals. After weighing the evidence of two experts on this issue, the Tribunal determined that a person with a type II diabetic condition can experience communication/social issues due to the symptoms of their condition, especially when under stress. The Tribunal also found that the complainant was experiencing elevated blood sugar levels around the time when communication issues were identified by her employer as having a negative impact on her performance.

The respondent also claimed the complainant's performance appraisals showed a history of performance issues at work that were unrelated to the symptoms of her diabetic condition. As a result, it claimed it was justified in terminating the complainant based on the superior performance record of the other incumbent. After examining the complainant's performance appraisals, the Tribunal rejected this argument as well. Although there was an indication in one performance appraisal that the complainant needed some improvement in her communication with others, there was nothing significant enough in any of the performance appraisals to indicate that she had a history of performance issues. Performance issues only began to arise following the diagnosis of her disability and her attempts to reduce the impact of stress on her condition.

While the complainant tried to address these issues with the respondent and have her performance appraisals changed, the complainant's disability was not considered as a factor affecting her performance. As those performance appraisals were used as the basis for terminating the complainant, the Tribunal concluded that disability factored into the respondent's decision to no longer employ her.

This decision is currently subject to an application for judicial review.

Results for Canadians

For employers, this decision highlights some important aspects of the law surrounding disability accommodation. First, employers have a duty to seek all relevant information about an employee's disability once they become aware of it. This may include information about the employee's current medical condition, prognosis for recovery, ability to perform job duties and capabilities for alternate work. Second, based on this information, the employer must seriously consider how it can accommodate the employee's disability up to the point of undue hardship. Following this procedure and documenting it may provide a basis for successfully defending against a claim of discrimination on the basis of disability.

MARLO NASTIUK V. COUCHICHING FIRST NATION AND THOMAS SINCLAIR, 2012 CHRT 12

The complainant alleged that her employer and supervisor harassed her on the basis of her sex. She also claimed that her employer retaliated against her by failing to address her concerns and failing to protect her from the effects of harassment by her supervisor.

According to the complainant, there was a breakdown of the working relationship between her and her supervisor, which resulted in a hostile workplace. From the complainant's perspective, the deterioration in the relationship had its origin in things said to her in casual conversation between them, anecdotal comments made by the supervisor about himself, or inquiries by him into her private life. These comments made her feel uncomfortable and resulted in the complainant having a deep-seated aversion to her supervisor. The complainant testified that she suffered in silence, unable to confront her supervisor and demand he stop making personal comments to her that she found offensive.

However, in her testimony, the complainant acknowledged occasions when she did engage in normal personal conversations with her supervisor, and other occasions when she was able to challenge him. She provided evidence of many interactions between them that were normal activities that she willingly engaged in, such as her supervisor repairing her car and fixing her air conditioning and her furnace. Despite the complainant's assertion that it was her supervisor who created a hostile workplace, the Tribunal found that the evidence revealed that it was the complainant's irascibility with and condescension to co-workers that created hostility toward her. Finally, when the complainant was asked in cross-examination to provide details and examples of the alleged sexual harassment by her supervisor, she was unable to describe a single example. Nor was she able to give an example as to how her employer failed to protect her in the workplace from the effects of her supervisor's alleged harassment.

Therefore, the Tribunal concluded that the complainant was not a credible witness, and that her testimony in support of her allegations of sexual harassment and retaliation did not establish a *prima facie* case. As a result, her complaints were dismissed.

This decision is currently subject to an application for judicial review.

Results for Canadians

The significance of this decision lies primarily in its provision of a clear and concise overview of the state of the law regarding the *prima facie* test for discrimination in the context of a complaint of sexual harassment. Specifically, in this case, the complainant failed to establish that her supervisor's conduct was *unwelcome* and *sexual in nature*. This decision therefore serves as a valuable reminder to complainants that they have an initial onus to lead some evidence in support of each constituent element of an alleged discriminatory practice.

STEPHEN CLOSS V. FULTON FORWARDERS INCORPORATED AND STEPHEN FULTON, 2012 CHRT 30

The complainant made various allegations of discrimination stemming from his employment with the respondents. His wife suffered two miscarriages during this time, and the complainant claimed to have been denied time off to go to the hospital to be with her during the miscarriages and to grieve the loss afterwards. According to the complainant, this constituted discrimination on the basis of family status. Following those incidents, the complainant suffered a knee injury and required time off from work to recover. Instead, his employment was terminated, which the complainant claimed was discrimination on the basis of his disability.

With regard to the miscarriages, the Tribunal found that the relationship between spouses is protected by the ground of family status, and that the loss of the pregnancies was suffered by the complainant and his spouse together, as a family. Therefore, the employer had a duty to consider whether it could accommodate the complainant's request for time off to attend to his family obligations. The Tribunal concluded there was no evidence to suggest the employer seriously considered the complainant's needs in requesting time off during and after the miscarriages, or that it seriously considered whether it could accommodate those needs.

With respect to the complainant's termination, the Tribunal found that despite presenting his employer with a doctor's note indicating when he could return to work following his leg injury, the employer hired another driver to perform the complainant's job. The employer maintained that the decision to hire another driver was in response to the complainant's notification that he could no longer drive at night safely because of the symptoms of his lupus. According to the employer, there was not enough daytime work to accommodate a driver who was restricted from driving at night. The complainant, for his part, denied having notified the employer of such a restriction. But regardless of whether such notification had actually been given, the employer never requested medical documentation regarding the complainant's lupus; the Tribunal could therefore not accept that the employer had seriously considered whether it could accommodate the complainant's alleged night-driving work restriction. Nor was sufficient evidence led to establish that accommodating the complainant's alleged work restriction would have caused the employer undue hardship. Therefore, the Tribunal concluded that the complainant had been subjected to discrimination when, as result of his disability (both his knee injury and his lupus), he was no longer offered continued employment.

Results for Canadians

The relevance and importance of this decision lies in the Tribunal's interpretation of the prohibited ground of "family status." As the circumstances of the case involved a miscarriage, and not obligations arising from a traditional parent-child relationship, it was argued that extending the definition of family status to cover the circumstances of the case would stretch its definition beyond that of any prior jurisprudence and beyond a reasonable interpretation of the statute. However, instead of focusing on whether the complainant fit into an identifiable category of persons protected by the ground of family status, the Tribunal chose instead to focus on the harm suffered by the individual. In so doing, the Tribunal recognized that it was the relationship between the complainant and his spouse that gave rise to the familial obligations in question in this case. As the term "family status" is not defined in the Act, the *Closs* decision has made a tangible contribution to the jurisprudential understanding of what is protected by this prohibited ground of discrimination.

Rulings on Motions and Objections

In addition to decisions, the full text of all formal rulings on motions and objections rendered in 2012 can be found on the Tribunal's website at **http://chrt-tcdp.gc.ca/NS/index-eng.asp**.

Tribunal Activities

Appointments

The Government of Canada appointed three new part-time Members to the Tribunal in 2012, one in May and two in December. This brings to seven the total complement of part-time Tribunal Members, a development that will help reduce the accumulated backlog of cases.

Appearances before House of Commons Standing Committees

The Tribunal was invited to appear before two House of Commons Standing Committees in 2012. In October the Acting Chairperson was invited to appear before the Standing Committee on the Status of Women in connection with its study on sexual harassment complaints in the federal sphere. In November he was invited to chronicle the Tribunal's experience with trans-gender and gender-identity discrimination, appearing before the Standing Committee on Justice and Human Rights during its consideration of Bill C-279, which would add gender identity and gender expression to the list of prohibited grounds of discrimination in the *Canadian Human Rights Act*.

Corporate Activities

Like small departments and other micro-agencies, the Tribunal continually faces pressure to respond to or implement various government-wide management initiatives. In 2012, the Tribunal continued its work on several fronts, such as focusing on strengthening the necessary systems and re-establishing and reinforcing sound management practices. Of note are the following activities.

Audits

The Office of the Comptroller General of Canada completed its Core Control Audit for the Tribunal in April 2012. The Acting Chairperson and the Executive Director were invited to appear in front of the Small Department and Agencies Audit Committee to discuss the findings and the resulting management plan. As the Tribunal only met one of the key requirements of the policy instruments tested, great efforts in 2012 focused on redressing its processes and establishing controls to ensure compliance with legislative authorities and policy instruments that govern sound financial management practices.

Website

In early 2011, a management decision was made to outsource the Tribunal's information technology (IT) section to Public Works and Government Services Canada (PWGSC). Meanwhile, the Tribunal's Internet, intranet and webmaster services remained in-house, with a plan to update and refine these services over time. However, the Federal Court's decision in *Jodhan vs. the Attorney General of Canada* created an immediate imperative for all departments and agencies to implement a new *Standard on Web Accessibility* for all Web pages by July 31, 2013, and to comply with the internationally accepted Web Content Accessibility Guidelines (WCAG) 2.0. The Tribunal directed efforts to complying with the Federal Court order, partnering with Lexum, a turn-key service provider for the electronic data hosting and publishing of its legal decisions. At the same time, the Tribunal eliminated redundant and obsolete content from its website and converted the remaining content to comply with the new accessibility standard.

Information Technology

The Tribunal's IT operating environment continued to be challenged in 2012 as a result of the malicious 2011 attack on its network and the subsequent outsourcing of its IT capabilities to PWGSC. For much of the year, Tribunal personnel were forced to work with IT systems running far below their normal capacity. Throughout 2012 the Tribunal continued to address new policy requirements for its financial IT system, as well as interoperability issues resulting from the outsourcing.

Members of the Tribunal

Biographies

Full-time Members

SUSHEEL GUPTA
Acting Chairperson (Vice-Chairperson)

A Member of the Tribunal since August 2010, Susheel Gupta was appointed Acting Chairperson in April 2012. He obtained his Bachelor of Arts at the University of Waterloo in 1993 and his J.D. from the University of Ottawa in 1998. Called to the Ontario Bar in February 2000, he has served most of his career in the federal public service, as a prosecutor and computer crime advisor, as a special advisor at the Canadian Air Transport Security Authority, and as counsel in the Crimes Against Humanity and War Crimes section of the Department of Justice. Mr. Gupta is currently on leave from the Public Prosecution Service of Canada.

As a community member and public servant, Mr. Gupta has been the recipient of the Government of Canada Youth Award for Excellence, the Deputy Minister of Justice Humanitarian Award, the Ontario Justice Education Network Chief Justice Lennox Award and the Queen's Diamond Jubilee Medal.

SOPHIE MARCHILDON
Full-time Member

Sophie Marchildon was appointed in 2010 to a three-year term as a full-time Member of the Canadian Human Rights Tribunal. She completed her Bachelor of Laws at the Université du Québec à Montréal. She completed her Master's Degree in International Law and International Politics at the Université du Québec à Montréal and was the recipient of the 2006 Award of Excellence for Best Student in the International Human Rights Law Clinic. She is a member of the Quebec Bar.

Ms. Marchildon has practised immigration law, human rights law and health law. She served as a lawyer and co-director at the Council for the Protection of the Sick (Conseil pour la protection des malades) from 2005 to 2006, and was an assessor and member of the Quebec Human Rights Tribunal. She volunteered on several clinical ethics committees between 2005 and 2010, and worked as an ombudsman for health care services in the province of Quebec from 2006 until her appointment to the Canadian Human Rights Tribunal in May 2010.

With a licence in mediation from the Quebec Bar, Ms. Marchildon has handled more than 200 mediations in the realm of human rights and the health care system. She was part of the Quebec Ministry of Health and Social Services' Team of Visitors, which evaluated the quality of services in nursing homes across the province of Quebec. With respect to the elderly and her professional experience, Ms. Marchildon taught the course, "Violence envers les personnes âgées—Vio 2008," at the Université de Montréal in 2009.

Part-time Members

MATTHEW D. GARFIELD (ONTARIO)

Matthew D. Garfield was appointed as a part-time Member of the Canadian Human Rights Tribunal in 2006 and re-appointed in 2011.

Mr. Garfield is a lawyer, chartered mediator and chartered arbitrator. He is the president of ADR Synergy Inc., a firm that specializes in mediations, arbitrations, workplace investigations and assessments, and the monitoring of implementation of Court/Tribunal orders. Mr. Garfield is also an adjudicator at the Indian Residential Schools Adjudication Secretariat.

From 2000 to 2004, Mr. Garfield was the Chair of the Human Rights Tribunal of Ontario. He had joined the Ontario Tribunal as Vice-Chair in 1998. He both adjudicated and mediated cases under the *Ontario Human Rights Code* involving claims of discrimination, harassment and reprisal. Prior to his appointment to the Ontario Tribunal, Mr. Garfield practised law in Toronto.

Mr. Garfield graduated from Dalhousie Law School in 1988 and was a recipient of the class prize in Constitutional Law. He was called to the Nova Scotia Bar in 1989 and the Ontario Bar in 1992.

WALLACE G. CRAIG (BRITISH COLUMBIA)

Wallace Gilby Craig was re-appointed in 2011 to a three-year term as a part-time Member of the Canadian Human Rights Tribunal. A former judge, he worked in the justice system for 46 years, including 20 years in a general practice.

Judge Craig was promoted to the Bench in 1975 and presided over the Vancouver Criminal Division—Provincial Court of British Columbia from 1975 until 2001. After retirement in his hometown of Vancouver, Judge Craig became the author of *Short Pants to Striped Trousers: The Life and Times of a Judge in Skid Road Vancouver*. He had earned his LL.B. from the Faculty of Law at the University of British Columbia.

RÉJEAN BÉLANGER (QUEBEC)

Réjean Bélanger was re-appointed in 2011 to a three-year term as a part-time Member of the Canadian Human Rights Tribunal. Mr. Bélanger is a lawyer and certified mediator.

He holds a Bachelor of Education from the Université de Montréal, as well as a Bachelor of Arts, a Bachelor of Commerce, a Master of Education and a Bachelor of Law from the University of Ottawa. Mr. Bélanger was admitted to the Quebec Bar in 1980 and has conducted a private practice in Gatineau, Quebec, principally in the areas of labour and administrative law.

He received his accreditation as a mediator in the areas of civil, commercial and family matters in 1997. He has argued before several administrative tribunals, the Superior Court of Quebec, the Court of Appeal and the Supreme Court of Canada.

Before becoming a lawyer, Mr. Bélanger served as deputy secretary of the Franco-Ontarian teachers association and as director of the Regional Office of the Teachers Association of West Quebec. He is also an active member of the board of directors of three non-profit organizations involved in bringing aid to African countries, the Antilles (Haiti) and Central America (Honduras).

EDWARD LUSTIG (ONTARIO)

Edward Lustig was re-appointed in 2011 to a five-year term as a part-time Member of the Canadian Human Rights Tribunal.

Mr. Lustig received his Bachelor of Arts from the University of Toronto, his Bachelor of Laws from Queen's University, and was called to the Bar of Ontario with First Class Honours in 1975. He has been a member of the Law Society of Upper Canada and the Canadian Bar Association since 1975. Mr. Lustig joined the legal department of the City of Niagara Falls in 1975 and, after 27 years of dedicated service, he retired in 2002. In January 2006 he joined Broderick & Partners as counsel and carries on a general law practice with particular emphasis on municipal law, planning and development matters, commercial and real estate law, and related litigation. Mr. Lustig also has experience in labour matters, including employment and pay equity.

ROBERT MALO (QUEBEC)

Robert Malo was appointed in May 2012 to a three-year term as a part-time Member of the Canadian Human Rights Tribunal. Called to the bar in 1978, Mr. Malo enjoyed a wide-ranging legal practice, encompassing civil litigation, marriage law, youth law, administrative law, and criminal and penal law. During the 1980s, Mr. Malo served as Vice President of sales and administration and later as President and CEO of his family's commercial printing business in Joliette, Quebec.

In 1989, Mr. Malo returned to private practice until November 2003, when he became a permanent member of the Veterans Review and Appeal Board until January 2009. Between March 2010 and January 2011, Mr. Malo worked for a Laval, Quebec, law firm, where he served as head of business development in the Lanaudière region of Quebec. In December 2011, Mr. Malo became a partner at the law firm Les avocats Alain Généreux et Robert Malo in Joliette.

Mr. Malo has vast experience as a litigator, having appeared before the Quebec Court, Superior Court and Court of Appeal, and before the Supreme Court of Canada, as well as various quasi-judicial administrative tribunals. In addition to his qualifications as a lawyer and, more recently, as a permanent member of the Veterans Review and Appeal Board, Mr. Malo has also been a family mediator since 1997 and

mediator in civil, commercial and labour matters since 2009. Mr. Malo is well known in his community for his involvement in numerous local organizations.

GEORGE E. ULYATT (MANITOBA)

George Ulyatt was appointed in December 2012 to a three-year term as a part-time member of the Canadian Human Rights Tribunal. He holds a Bachelor of Arts degree from Brandon University and a Bachelor of Laws degree from the University of Manitoba. Mr. Ulyatt was called to the Manitoba Bar in 1976 and has been in private practice for more than 35 years, litigating major cases in the Courts of Manitoba.

Mr. Ulyatt has worked with several administrative tribunals, serving as counsel to the Mental Health Review Board of Manitoba and the College of Registered Psychiatric Nurses of Manitoba, among others. He has previously been appointed an Inquiry Officer under the *Expropriation Act* and has conducted public inquiries throughout Manitoba.

As a community member and a volunteer, Mr. Ulyatt has been active in amateur sport at the team, provincial and national levels, serving a five-year term as President of Hockey Manitoba and as a member of the Board of Directors of Hockey Canada. In 2006 he received Hockey Canada's Order of Merit for contributions to hockey in Canada.

OLGA LUFTIG (ONTARIO)

Olga Luftig was appointed in December 2012 to a three-year term as a part-time member of the Canadian Human Rights Tribunal. She holds an Honours Bachelor of Arts degree in history and political science, as well as a Bachelor of Education from the University of Toronto. She received her Bachelor of Laws degree from the University of Windsor.

A practising lawyer, Ms. Luftig also serves as a part-time member of both the Town of Markham Municipal Election Audit Compliance Committee and the York Region Catholic and York Region District School Boards' Joint Election Compliance Audit Committee.

Ms. Luftig has had wide-ranging experience in diverse areas of the law, as both a former corporate in-house properties lawyer and as a private practitioner.

She also served as a member of the Landlord and Tenant Board of Ontario, where she adjudicated hearings.

For Further Information

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